# DUTIES FOR THE EXERCISE OF A FIDUCIARY POWER....THE SMELL TEST!

MAY 2016

In the ***Representation of the Jasmine Trustees Limited [2015] JRC196*** the Royal Court had to consider whether or not new trustees and protectors had been validly appointed to two trusts, the P Trust and the R Trust. In doing so the Court gave guidance on how fiduciary powers should be exercised.

The two trusts were family trusts and the case was set against a backdrop of acrimonious relationships between a father and his two sons on the one hand, and the father's daughter on the other and certain US litigation between these parties.

The P Trust was a discretionary trust. The class of beneficiaries included the father, the elder son, the younger son, the daughter and their respective children. The father was the protector of the P Trust and Jasmine Trustees Limited ("Jasmine") was the trustee from October 2008. The R Trust was also a discretionary trust. The class of beneficiaries was the same as the P Trust with the addition of two other named individuals. The father was the protector and Jasmine and Lutea Trustees Limited ("Lutea") were the trustees.

In 2014, the father purported to exercise his power as protector in relation to both the P and R Trusts to remove Jasmine and Lutea and appoint a new trustee Kairos (a small New Zealand Trust company) in its place.

In relation to the R Trust, the father retired as protector and appointed the elder son and the younger son as protectors in his place. Under the terms of the P Trust, the power to appoint a new protector rested with a majority of the adult beneficiaries of the Trust. All the adult beneficiaries except the daughter executed a deed appointing the elder son and the younger son as protectors of the P Trust.

Jasmine and Lutea challenged the validity of the appointments of Kairos and the daughter sought a declaration that the appointments of the elder son and younger son as protectors of both Trusts were invalid.

The Court considered the duties for the exercise of a fiduciary power by a trustee and considered that such duties should apply to the holder of any fiduciary power, not just a trustee. Whilst it did not suggest an exhaustive list, the Court held that when exercising the power to appoint a new trustee, a protector was under a duty to:

- to act in good faith and in the interests of the beneficiaries as a whole;
- to reach a decision open to a reasonable appointor (ie not to exercise the power irrationally; the decision must not be one at which no reasonable power holder could arrive);
- to only take into account relevant matters; and
- not to act for an ulterior purpose.

The threshold for setting aside the appointment therefore had to go much further than merely being mistaken, but be an *irrational* decision for the Trustee i.e. *"a decision which no reasonable holder of the power could arrive at."*

Applying these factors, the Court found that the appointment of Kairos was invalid. The Court also concluded that the appointment of the two brothers as protectors was invalid. The daughter had legitimate fears over how her two brothers would perform their function as a protector. They had a history of being willing to do exactly as their father wished, and it had been shown in the US litigation that they paid little attention to fiduciary duties.

Interestingly, the judge noted that had the appointment of the sons not reached the threshold of being irrational, the Court would not have been removed as they had not undertaken any actions which casted doubt upon their fitness. *"if, on the other hand, we are wrong and the appointments of the elder son and the younger son do not pass the high threshold of being irrational, we would not think it right to remove them."*

The court also recommended that, in the interests of a fresh start with both sides having confidence in the new trustee, it would be preferable to select an entity without connections to any of the beneficiaries, however remote.

In the subsequent case of ***In the matter of the Piedmont Trust and the Riveira Trust [2016] JRC016*** the Court was considering the question of costs of the parties in preceding *Jasmine* decision. Different principles apply depending on whether one is acting as a trustee, a fiduciary or a beneficiary. The general position is that a trustee is entitled (as a matter of right) to be reimbursed for the expenses and liabilities that he has reasonably incurred in connection with the trust. This is the *trustee basis* of costs and confers a full indemnity.The position of a person with fiduciary functions in relation to a trust is the same. The Court went on to consider when a fiduciary might lose this right of indemnity. It concluded that the trustees were justified in bringing the original proceedings. Although the Court noted that the appointment of the sons as protectors (i.e. fiduciaries) was outside the band of reasonable decisions, it did not seek to deprive them of their indemnity. Further, it did not deprive the father of his indemnity even though the appointments by him were found to be invalid.

As regards the entitlement of a beneficiary to recover his or her costs, the extent of their recoverability depends on how one classifies the nature of the proceedings:

1. proceedings instituted by trustees to have a question regarding the administration of the trust determined (category 1);
2. proceedings instituted by beneficiaries to have questions regarding the administration of the trust determined (category 2); and
3. proceedings instituted by beneficiaries which assert claims adverse to other beneficiaries (category 3).

The Court confirmed that in respect of a case falling within categories 1 or 2, he or she is entitled to costsout of the trusts on the *indemnity basis* unless they have behaved unreasonably. These are costs awarded by the Court where it is exercising its discretion to determine who should pay the costs of litigation and which are subject to taxation (i.e. assessment) by the Judicial Greffier if not agreed.

In practice, there is unlikely to be a great difference in quantum between the two levels of costs, however, there may still be a difference.

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